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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RUSSELL FISCHER, Petitioner and Appellant, v. BOARD OF CIVIL SERVICE COMMISSIONERS FOR THE CITY OF LOS ANGELES, Respondent, DEPARTMENT OF WATER AND POWER, Real Party in Interest.	B199783 (Los Angeles County Super. Ct. No. BS103285)

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

Douglas N. Silverstein and David A. Cohn for Petitioner and Appellant.

No appearance for Respondent Board of Civil Service Commissioners of the City of Los Angeles.

Rockard J. Delgadillo, City Attorney, Richard M. Brown, General Counsel, Department of Water and Power, Cecil W. Marr, Senior Assistant City Attorney, for Real Party in Interest.

INTRODUCTION

Petitioner and appellant Russell Fischer (Fischer) was suspended for 10 days from his job as an electric station operator with the Los Angeles Department of Water and Power (DWP) for violating DWP safety procedures on two separate occasions. He unsuccessfully appealed his suspension to the Board of Civil Service Commissioners (the Board). Fischer petitioned the Superior Court for a writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5, subdivision (a).[1] The Superior Court denied the petition. On appeal, Fischer contends that (1) the trial court erroneously afforded a presumption of correctness to the findings of a DWP investigation that was "obviously flawed and prejudicial"; (2) the trial court erred under Evidence Code section 412 by crediting an adverse witness's hearsay testimony over Fischer's contrary testimony; and (3) the 10-day suspension was grossly excessive. We reject each of these contentions and affirm.

BACKGROUND

Fischer has been employed by DWP as an electric station operator for more than 25 years. In November 2004, Fischer was a first operator (also known as a lead or control operator) at the Sylmar Converter Station (SCS), a bulk power facility that can transmit or receive and distribute electricity. SCS operates around the clock, seven days per week. Fischer was responsible for the day-to-day operation of the station and for maintaining a safe working environment for those working on the station's high voltage equipment. Fischer was assigned to SCS East, which was then in the final stages of a

[1] All statutory references are to the Code of Civil Procedure unless stated otherwise.

substantial modernization project that consolidated SCS East and SCS West into a single station.

A. The November 2004 Incident

On the morning of November 15, 2004, Fischer was assigned as the first operator at SCS East. Fischer received a request for work clearance from two senior electric mechanics at SCS who were assigned to test and, if necessary, repair the load interrupting disconnect 236 (LID) for DA27 Shunt Reactor.[2] As first operator, Fischer was responsible to review the request, determine the switching necessary to permit the mechanics safely to perform their work, discuss the request with the station's Energy Control Center (ECC) dispatcher, perform the necessary switching, place appropriate accident prevention tags,[3] and issue the appropriate work clearance.

The ECC dispatcher gave Fischer a boundary clearance, which transferred to Fischer the responsibility for performing all switching within the boundary necessary to permit the work to be done safely. The switching would involve making all disconnects necessary to isolate Converter 1 AC Filter Bus 2 and DA 27 Shunt Reactor from all sources of high voltage potential. Converter 1 AC Filter Bus 2 and DA27 Shunt Reactor had been used at SCS for more than a decade prior to the modernization project, so the switching procedures for those pieces of equipment were well established.

Approximately 30 minutes after the mechanics requested work clearance, Fischer called to inform them that the switching was complete and that they were clear to work on the equipment. In accordance with DWP procedure, the mechanics inspected the

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[2] An LID is essentially a very large circuit breaker. A shunt reactor is used in an extra high-voltage substation to neutralize inductive reactance in long extra high-voltage transmission lines. (See <http://www.osha.gov/SLTC/etools/electric_power/glossary.html#s>.)

[3] The verb "to tag" refers to the act of placing accident prevention tags.

equipment before beginning work. They became concerned that the equipment had not been switched out and tagged properly. They discussed the issue with Fischer, who said the switching had been done as requested by the ECC dispatcher. The mechanics were not satisfied with Fischer's explanation and asked their supervisors to intervene. Their supervisors inspected the equipment and were also concerned that it was not properly switched out and tagged. The supervisors called Ignacio Juarez, the station's training and safety officer. Juarez inspected the equipment and found that Fischer had not decoupled, locked and tagged the LIDs for Converter 1 AC Filter Bus 2; had not decoupled, locked and tagged the LID for DA27 Shunt Reactor; had not locked closed and tagged the ground switch for DA27 Shunt Reactor; and had failed to test whether DA27 Shunt Reactor was "de-energized."

Juarez went to the station's control room and instructed Fischer to close and tag the ground switch. Fischer did so. Juarez called Paul Kozovich, the Chief Electric Station Operator and acting station manager superintendant for SCS, to inform him of the incident. Kozovich instructed Juarez to relieve Fischer of his duties and to perform the proper switching so the mechanics could do their work. Kozovich; Gary Brynjegard, a Chief Electric Plant Operator and a former superintendant of SCS; and William Spring, DWP's Assistant Director of Power System Operations and Maintenance, all testified that Fischer's conduct could have caused personal injury or death by electrocution. Juarez said one could get "a good shocking," but he doubted "anybody could have gotten hurt."

Fischer testified that Kozovich does not like him and "got a few people together and they were trying to set up a situation to get [Fischer] in trouble." Kozovich had done this, Fischer claimed, "many times over the years." Fischer testified that SCS East was a "new station," no operating procedures had been put into place, he had received no training, and he was working alone. He said that they had "to be self-taught on" the new control systems. He testified that, when he had received the mechanics' request for clearance on November 15, he had on his own initiative used SCS East's new computer control system to place electronic inhibits and tags on Converter 1 AC Filter Bus 2 and DA27 Shunt Reactor. He explained what he had done to the mechanics, who appeared to

accept his explanation. The mechanics later returned and told him they needed the ground switch and LID unlocked, which he did. When Juarez later came to the control room, Fischer testified, he "turned the place into a circus" as he "usually does."

B. The January 2005 Incident

On January 11, 2005, Fischer was again assigned as first operator at SCS East. One of the operators on duty that day gave verbal authorization to two employees of an outside contractor, ABB, Inc., to switch on station equipment by placing 480 volt circuit breakers in an energized panel. The contractors had not received the necessary training to be authorized to switch on station equipment under DWP operating orders, safety rules and OSHA (federal and state Occupational Safety and Health Administration) requirements. In addition, when switching on the equipment, the contractors removed "Do Not Connect" accident prevention tags in violation of DWP operating orders. Kozovich testified that the two employees had identified Fischer as the operator who had given them permission to perform the work. There is no indication Fischer objected to this hearsay evidence. William Spring testified that 480 volts is "certainly sufficient electricity to kill a human being easily."

In a contemporaneous written statement and at the administrative hearing, Fischer claimed he had no recollection of and knew nothing about the January 2005 incident. Fischer asserted that a fellow employee had reported the incident to Kozovich "because he [the fellow employee] wanted to get [the contractor's] personnel in trouble." Fischer speculated that another operator on duty probably had worked with the contractor's employees before Fischer came on shift. Fischer accused Kozovich of lying to "suit [management's] agenda." He said that engineers were out to "get" him and one went to Kozovich knowing that the latter "wanted to discipline [him]."

C. Procedural History

Kozovich and Brynjegard investigated both incidents. With respect to the November 2004 incident, Kozovich concluded that Fischer had violated five DWP operating orders, as well as California OSHA and federal OSHA rules and regulations, which require (1) application of appropriate accident prevention tags; (2) obtaining a clearance prior to contacting normally energized equipment; (3) obtaining adjoining clearances when working on equipment that connects two or more circuits; (4) testing equipment for the presence of voltage prior to work; and (5) grounding equipment prior to work. With respect to the January 2005 incident, Kozovich concluded that Fischer had violated DWP operating orders and federal OSHA regulations prohibiting unauthorized persons from operating high voltage equipment and regarding the proper placement and removal of accident prevention tags.

Based on the results of Kozovich's investigation, DWP charged Fischer with three disciplinary offenses: (1) violating department rules; (2) failing to carry out assigned work or supervisory responsibilities adequately, directly, or promptly; and (3) knowingly violating safety rules, procedures or accepted practices which could have resulted in injury, damage to equipment, or degradation of electric or water services. DWP proposed to suspend Fischer for 10 days, the maximum penalty set forth in DWP's disciplinary guidelines for a first offense of the most serious violation charged. In response, Fischer's union representative argued that the penalty be reduced to a written "Notice to Correct Deficiency" for procedural errors. DWP rejected the union's argument and imposed the 10-day suspension.

Fischer appealed to the Board. With respect to whether the disciplinary charges should be sustained, the Board's hearing examiner concluded that the parties had "testified to substantially different versions of certain events," so that the issue was primarily one of credibility. The hearing examiner "resolved the credibility issues in the Department's favor," and found "no evidence" to support Fischer's defense that "he has been singled out for harsh treatment and that management is 'out to get' him." The

hearing examiner also concluded that "the seriousness of the charges and the potential for injury or damage are significant enough" to warrant the penalty imposed, even though Fischer had no prior record of discipline. The hearing examiner recommended that the Board find that Fischer had been accorded due process; that all three disciplinary charges were sustained; and that the 10-day suspension was appropriate. The Board adopted the hearing examiner's recommendations.

Fischer petitioned the trial court for administrative mandamus pursuant to section 1094.5, subdivision (a), arguing that the weight of the evidence did not support the Board's finding that Fischer had violated clearly established DWP policies and that the Board had abused its discretion in sustaining a "grossly excessive" penalty. The trial court rejected both contentions. With respect to whether the weight of the evidence supported the Board's determination that Fischer violated DWP policy, the trial court exercised its independent judgment in reviewing the evidence as required by section 1094.5, subdivision (c). Because the issues were technical and the testimony was conflicting, the trial court determined that it was required to "'afford a strong presumption of correctness concerning the administrative findings,'" pursuant to the California Supreme Court's decision in *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 (*Fukuda*). Applying that standard, the trial court concluded that the weight of the evidence in the administrative record supported the Board's decision. The trial court also concluded that, in light of the potential consequences of Fischer's misconduct, the penalty was not grossly excessive. DWP "is not required to wait until [Fischer] kills or injures someone before imposing a ten day suspension upon him." The trial court therefore denied Fischer's petition. Fischer timely appealed.

DISCUSSION

A. Standards of Review

In reviewing an order denying administrative mandamus pursuant to section 1094.5, the courts apply two distinct standards of review. First, with respect to the administrative agency's findings of fact, "if the order or decision of the agency substantially affects a fundamental vested right, the [trial] court, in determining under section 1094.5 of the Code of Civil Procedure whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the [agency's] findings are not supported by the weight of the evidence."[4] (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 44.) "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda, supra,* 20 Cal.4th at p. 817.) "[T]he presumption provides the trial court with a starting point for review but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Id.* at p. 818.)

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[4] Section 1094.5, subdivision (b) provides that a trial court's inquiry in administrative mandamus proceedings "shall extend to the questions . . . whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, *or the findings are not supported by the evidence.*" (Italics added.) Section 1094.5, subdivision (c) provides in relevant part: "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. . . ."

On appeal, however, we do not exercise our independent judgment. Rather, we review the trial court's findings under the substantial evidence test. (*Fukuda, supra*, 20 Cal.4th at p. 824.) In applying the substantial evidence test, "our review of the record is limited to a determination whether substantial evidence supports the trial court's conclusions and, in making that determination, we must resolve all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court. [Citations.]" (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 659-660.)

Second, with respect to the penalty imposed, the trial court must not disturb the administrative agency's determination of the appropriate penalty unless there is a manifest abuse of discretion. (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 53.) "Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. [Citation.]" (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.) A court may not interfere with an agency's chosen penalty merely because, based on the court's evaluation of the circumstances, the penalty appears too harsh. (*Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 107.) "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion the administrative body acted within the area of its discretion. [Citations.]" (*Ibid.*) On appeal, we apply the same abuse of discretion standard of review as the trial court and, accordingly, give no deference to the trial court's conclusion. (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 47.)

B. The Trial Court Did Not Err By Affording the Hearing Examiner's Findings a Presumption of Correctness

As noted above, the California Supreme Court stated, "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative

decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda, supra,* 20 Cal.4th at p. 817.) Fischer argues, in effect, that the trial court erred by "'afford[ing] a strong presumption of correctness concerning the administrative findings'" in this case because there was evidence that Kozovich's investigation into Fischer's alleged misconduct was biased and conducted in bad faith. Fischer complains that "[t]he trial court never considered this."

Fischer did not raise this issue in the trial court. Fischer's argument in the trial court centered on his contention that, because of the modernization project ongoing at SCS East, "there were no clear rules in place covering the events which gave rise to Mr. Fisher's suspension," forcing Fischer to make "judgment calls" when operating the station. Although Fischer testified at the hearing, in effect, that Kozovich had conspired to get Fischer in trouble, Fischer did not argue to the trial court that evidence of Kozovich's alleged bias overcame the presumption of correctness required by *Fukuda, supra,* 20 Cal.4th at p. 817. Ordinarily, "'issues not raised in the trial court cannot be raised for the first time on appeal.' [Citations.]" (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417; accord, *Petropoulos v. Department of Real Estate* (2006) 142 Cal.App.4th 554, 561; *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.) Fischer thus forfeited the issue.

Even if that contention were not forfeited, we perceive no error. Fischer asserts that, by analogy to the Supreme Court's holding in *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93 (*Cotran*), the trial court in this case was required to determine whether Kozovich had conducted a "good faith" investigation into Fischer's alleged misconduct. *Cotran*, however, does not apply here. *Cotran* was a wrongful discharge case brought by an employee against a private-sector employer alleging the breach of an implied agreement not to terminate employment except for cause. (*Id.* at pp. 96-97.) The California Supreme Court held that, in such cases, the jury's function is not to determine whether the plaintiff-employee actually engaged in misconduct, but whether the defendant-employer was objectively reasonable in concluding that the employee had done so. (*Id.* at 103.) Fischer cites, and we have found, no authority applying the rule of

Cotran to define a trial court's function in administrative mandamus proceedings pursuant to section 1094.5.

Rather, as set forth in section 1094.5 and *Fukuda, supra,* 20 Cal.4th at p. 817, the trial court's function in administrative mandamus proceedings is to determine whether "there was any prejudicial abuse of discretion" (§ 1094.5, subd. (b)) because the administrative agency's "findings are not supported by the weight of the evidence" in the administrative record. (§ 1094.5, subd. (c).) Certainly, credible evidence of bias or bad faith might affect a trial court's assessment of the evidence, and might in some cases lead a trial court to conclude a petitioner has overcome the presumption of correctness afforded the hearing examiner's findings. (See *Fukuda, supra,* 20 Cal.4th at p. 818.) But the trial court's function is to determine whether the administrative agency's conclusion is supported by the weight of the evidence, not to review the propriety of the employer's investigation. Even a prejudiced investigation might reveal substantial evidence of actual employee misconduct.

Moreover, although Fischer did not raise the issue in the trial court, his assertion that the trial court "never considered" evidence of Kozovich's alleged "animosity" is incorrect. The trial court expressly acknowledged in its statement of decision Fischer's testimony that Kozovich "'got a few people together and they were trying to set up a situation to get me in trouble,'" that "he [Fischer] did not receive adequate training," that "he [Fischer] did the switching to the best of his ability," that "'nobody could have gotten hurt,'" and that "'no rules were violated.'" The trial court, having "independently reviewed the administrative record," nevertheless concluded that "petitioner has not carried the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." The trial court thus considered Fischer's testimony but rejected it, as had the hearing examiner. It is the function of the trial court, not the appellate court, to determine "the credibility of witnesses in its review of the administrative record." (*Ocheltree v. Gourley* (2002) 102 Cal.App.4th 1013, 1017.)

The record supports the trial court's conclusion. Kozovich's testimony that Fischer acted improperly was substantially corroborated by Gary Brynjegard, a former

superintendant of SCS; William Spring, DWP's Assistant Director of Power System Operations and Maintenance; and Ignacio Juarez, the training and safety officer at SCS. They all concurred in Kozovich's conclusion that Fischer violated DWP operating procedures, and there is no evidence that Kozovich improperly influenced their testimony. In addition, the hearing examiner received the written statements of 10 other witnesses and nearly 200 pages of exhibits pursuant to stipulations between the parties. There is no evidence that Kozovich improperly influenced the witness's written statements or falsified any of the documentary evidence. Fischer had a full and fair opportunity to cross-examine the witnesses and to challenge the evidence presented against him on the ground that it was tainted by Kozovich's alleged bias.

Finally, the evidence of Kozovich's alleged bias is equivocal at best, and is equally consistent with the conclusion that Kozovich was not biased but simply disagreed with Fischer regarding the propriety of Fischer's actions. The following bears on this issue:

- Fischer contends that the testimony of Juarez establishes that Kozovich's "animosity" against Fischer was "well known." Juarez merely testified, however, that Kozovich and Fischer "seem not to get along." This testimony provides scant support for Fischer's claim that Kozovich conspired with others to "set [him] up."
- Fischer contends that Kozovich told each witness that he interviewed during the investigation of the November 2004 incident Fischer's switching was "improper," and that this "irretrievably prejudiced the investigation." Fischer, however, fails to specify how the investigation was prejudiced. The percipient witnesses who gave statements regarding the November 2004 incident—including Fischer—agreed in most material respects on how the incident transpired. The primary dispute regarding the November 2004 incident pertained to whether the switching violated clearly established DWP procedures. The witnesses interviewed by Kozovich, however, were not involved in determining whether the switching violated procedure or whether Fischer should be disciplined.

- Fischer contends that Kozovich was biased because Kozovich did not consider as "mitigating facts" that (1) Fischer had never before been disciplined; (2) SCS was "de-energized" at the time of the November 2004 incident, so that no one could have been injured; (3) SCS was in the process of developing new operating procedures because of the on-going modernization project at the station; and (4) Fischer had used a computerized locking and tagging procedure, which he believed to be proper. The record, however, indicates that these facts *were* considered, but did not mitigate Fischer's misconduct. The following is in the record:
    - Spring, not Kozovich, made the final determination that Fischer would be disciplined. Spring testified that he considered Fischer's lack of a prior disciplinary record in making that decision.
    - Kozovich testified that the fact that SCS was "de-energized" was not determinative of whether injury could have resulted from the November 2004 incident. As Kozovich explained, "there were sources of energy in the station. There were 34,500 volt circuits come in that power up all the station auxillary [*sic*] powers. The department does not play that game. That the station is deenergized, [*sic*] but it's not deenergized from all sources of possible high voltage. And the department recognizes that capacitors and filters are energy storage devices that could be released and are considered a source of high voltage if they are connected to that bus[], and discharged into that bus[] while people are working on them and that is why we require that disconnect be locked open." Brynjegard agreed with Kozovich. He testified, "By definition the equipment involved the 220 KB filters are considered source[s] of energy because they contain stored energy. Someone coming into contact with a charged resister and hadn't been properly discharged and grounded could receive a shock that could result in death or injury." The fact that the station was de-energized thus was not necessarily a mitigating fact.

- Although the station was in the process of developing new procedures for new equipment, that fact did not mitigate Fischer's purported misconduct in November 2004. Kozovich testified that the equipment involved in the November 2004 incident was not new and that the existing procedures for switching out the equipment still applied. Kozovich's opinion in this regard was shared by Brynjegard, Juarez and Spring.
- Kozovich testified that Fischer's use of an electronic inhibit also did not excuse his violation of procedure. DWP policy was that electronic inhibits were inadequate for ensuring safe interaction with normally energized equipment. Electronic inhibits were appropriate "for use in reference to the energy control service that operates basically on computer screens," but not for equipment "out in the field." "[O]ut in the field it [the equipment] still has to be locked out and tagged out per the requirement for people coming in contact with normally energized equipment." When physical or "positive" means of locking and tagging a device were available, they were to be used. Brynjegard testified, "I considered it [the electronic inhibit] inadequate. The positive method of [locking] out a device means positive. A mechanical lock is considered more positive than opening, for instance, a molded case switch where you can't see the contents. But a switch is considered more positive than an electronic inhibit. So if you [Fischer] chose the least positive of all possibilities for locking out the equipment . . . . [W]ithout a superseding station operating instruction you were bound by the old rules. That equipment still had the existing interlocks and blockout positions and tag ability. [¶] So therefore, until you have received a superseding order you are bound by the old ones, and you should know that."

Accordingly, the evidence of Kozovich's alleged bias against Fischer was not so strong that the trial court erred, as a matter of law, by affording the hearing examiner's findings a presumption of correctness, as required by *Fukuda, supra,* 20 Cal.4th at p. 817.

C. The Trial Court Did Not Err Under Evidence Code Section 412

Fischer argues that there is no substantial evidence to support the administrative agency's finding that he violated DWP policy in connection with the January 2005 incident because, pursuant to Evidence Code section 412, the trial court was required to view Kozovich's testimony with "distrust." We disagree.

Fischer does not dispute that DWP policy was violated when an operator at SCS East gave unauthorized employees of ABB, Inc. permission to place 480 volt circuit breakers in an energized panel and to remove "Do Not Connect" accident prevention tags from the panel. Instead, Fischer argues that there is insufficient evidence that *he* was the operator who did so.

Evidence concerning the January 2005 incident was presented through the written statements of Roland Wyler and Nils Nordstrom, both employees of ABB, Inc.[5] Wyler stated that, prior to inserting the circuit breakers, he and Nordstrom "asked the operator" if they could test the equipment. Nordstrom stated that, before inserting the circuit breakers, he "asked the operator for and got verbal permission" to do so. Neither Wyler nor Nordstrom identified Fischer in their written statements as the operator who gave them permission to install the circuit breakers. Neither Wyler nor Nordstrom testified at the administrative hearing.

At the hearing, Kozovich testified that he had interviewed Wyler and Nordstrom, and that both had identified Fischer as the operator who had given them permission. Kozovich further testified that Wyler and Nordstrom did not identify Fischer in their written statements because "[t]hey don't want anybody to get in trouble." The identification of Fischer as the operator is supported by the SCS log book, which shows that Fischer was the first operator on duty at the relevant time.

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[5] The parties stipulated that, if called, Wyler and Nordstrom would testify consistent with their written statements.

Although Fischer refers to Kozovich's testimony as "inadmissible hearsay" in his opening brief, Fischer did not object on hearsay grounds either at the hearing or in the trial court, and he confirms in his reply brief that he "does not specifically object to the admission of this unreliable hearsay testimony." Such an objection would fail in any event. In proceedings before the Board, "[h]earsay evidence may be admitted for any purpose, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Los Angeles County Civil Service Rules, rule 4.10(B), Los Angeles County Code tit. 5, app. 1, p. 5-203 (Civil Service Rules).) Rather than arguing the hearsay rule,[6] Fischer contends that the trial court was required to view Kozovich's testimony with "distrust" by California Evidence Code section 412. Section 412 provides, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." The trial court erred, Fischer contends, by giving too much weight to Kozovich's testimony that Wyler and Nordstrom identified Fischer as the culprit, and by crediting Kozovich's testimony over Fischer's testimony that he was not involved in the January 2005 incident.[7]

Fischer forfeited this issue by failing to raise it at the administrative hearing and in the trial court. (*Redevelopment Agency v. City of Berkeley, supra,* 80 Cal.App.3d at p. 167.) Moreover, Evidence Code section 412 does not assist Fischer. "Technical rules of

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[6] As to whether hearsay can apply, see 1 California Administrative Mandamus (Cont. Ed. Bar. 2008) section 6.157, pages 290-291 [noting split of authority on whether objected-to hearsay can support a finding].

[7] Fischer states in his opening brief that he "unequivocally testified it was the other operator on duty at the time, Ken Ly, who was involved in interacting with Wyler or Nordstrom." In fact, Fischer testified that he "didn't know anything about" the January 2005 incident and "was surprised to learn about" it a "couple of weeks" later. He speculated, "What I *believe happened* was [Ken Ly] switched it out with ABB on the job training before I got there at work." (Italics added.) In his contemporaneous written statement regarding the January 2005 incident, Fischer stated that he was "very busy" and had "no recollection of any incident . . . ."

evidence do not apply to administrative hearings." (*Big Boy Liquors, Ltd. v. Alcoholic Bev. Etc. Appeals Bd.* (1969) 71 Cal.2d 1226, 1230; see Civil Service Rules, rule 4.10(A), p. 5-203 ["The hearing shall be formal, but need not be conducted according to technical rules relating to evidence and witnesses"].) "Thus neither the trier of fact nor the board was required to weigh the evidence in accordance with the provisions of section[] 412 . . . of the Evidence Code." (*Big Boy Liquors, Ltd. v. Alcoholic Bev. Etc. Appeals Bd., supra,* 71 Cal.2d at p. 1230.)

Furthermore, Evidence Code section 412 applies only if it is "within the power of the party" to produce the missing evidence; section 412 does *not* apply if the missing evidence is equally available to both sides. (*Provencio v. Merrick* (1970) 5 Cal.App.3d 39, 41-42; see also *Fleming v. Safeco Ins. Co.* (1984) 160 Cal.App.3d 31, 42; *Smith v. Covell* (1980) 100 Cal.App.3d 947, 956-957.) In this case, there is no indication in the record that securing the live testimony of either Wyler or Nordstrom at the hearing was "within the power of" DWP and not within the power of Fischer. Neither Wyler nor Nordstrom was an employee of DWP; both were employed by ABB, Inc., an independent contractor. It appears that Nordstrom was based in Sweden, and returned to Sweden shortly after he was interviewed by Kozovich. The record is silent regarding Wyler's whereabouts at the time of the hearing. If Wyler was based locally and subject to subpoena, then he was equally available to both parties. (See Civil Service Rules, rule 4.07(A)(3), p. 5-202 [petitioner has right to subpoena witnesses].) Accordingly, the trial court did not err under section 412.

D. DWP Did Not Abuse Its Discretion By Imposing the 10-Day Suspension

Fischer argues that a 10-day suspension was grossly excessive because it was the maximum possible penalty, and because "there was no consideration of any of the many mitigating factors." We disagree with both contentions.

First, the DWP Administrative Manual provides that a 10-day suspension was the maximum permissible penalty for an employee's *first* offense of violating safety rules,

procedures or accepted practices which could have resulted in injury or damage to equipment. Here, however, Fischer was disciplined for *two* such offenses. The maximum permissible penalty for a *second* offense was a 20-day suspension. It thus appears that Fischer was exposed to a possible 10-day suspension for his first offense, and a 20-day suspension for his second offense—a total of 30 days if imposed consecutively, or *triple* the penalty Fischer actually received. On the other hand, the Administrative Manual requires a suspension of no less than five days for a second offense. Given that Fischer was disciplined for two offenses punishable by suspensions totaling five to 30 days, a 10-day suspension does not appear to be grossly excessive.

Second, as noted above, Fischer's contention that "there was no consideration" of mitigating facts is incorrect. The facts cited by plaintiff were considered. Under all of the circumstances, we do not believe DWP abused its discretion by imposing a 10-day suspension.

DISPOSITION

The judgment is affirmed. Department of Water and Power is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.